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No. 629

In the

Supreme Court of the United States

OCTOBER, TERM, 1968

IN THE MATTER OF THE SUCCESSION OF E. W. K. ANDRAU

RESPONDENTS' OPPOSITION BRIEF to PETITION FOR WRIT OF CERTIORARI to the SUPREME COURT OF THE STATE OF LOUISIANA

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Respondents, Mrs. Helene Antoinette Andrau Siegler, William E. Andrau, and Mrs. Barbara Andrau Peck, who are the children and heirs of E. W. K. Andrau, pray that the Petition For Writ of Certiorari be denied.

JURISDICTION

It is respectfully suggested that the Supreme Court of the United States does not have jurisdiction of this cause.

The questions as to whether petitioner has waived its statutory rights and of estoppel are not federal ones, and when the Louisiana Supreme Court applied state law and nonfederal doctrine which forbids parties from assuming inconsistent positions in judicial proceedings, this Court will not take jurisdiction. *Leonard v. Vicksburg*, (1905) 198 U.S. 416.

The petitioner has not met its burden to show affirmatively that this Court has jurisdiction. *Gorman v. Washington University*, (1941) 316 U.S. 98.

The Louisiana Supreme Court delivered no opinion, and its judgment *might* have rested upon nonfederal grounds. *Stembridge v. State of Georgia,* (1952) 343 U.S. 541.

Additional authorities as to this Court's lack of jurisdiction are cited, *infra.*

QUESTIONS PRESENTED

1. As To This Court's Jurisdiction

(1) Will this Court refuse to take jurisdiction where the judgment of the Louisiana Supreme Court rests upon the grounds of waiver, estoppel, state laws, and the Bank's inconsistent positions, all of which are nonfederal questions?

(2) Will this Court refuse to take jurisdiction where the petitioner fails to meet its burden to show affirmatively that this Court has jurisdiction?

(3) Where the Louisiana Supreme Court delivers no opinion and it appears that the judgment *might** have rested upon a nonfederal ground, will this Court refuse to take jurisdiction?

2. As To Louisiana District Court's Jurisdiction

(1) Do an executor's voluntary verified appearances in a probate proceeding constitute waiver which estops that executor from escaping the jurisdiction of that probate court when that court orders the executor, as an officer of that

* Emphasis upon the word "might" is by this Court in *Stembridge v. State of Georgia,* (1952) 343 U.S. 541.

court, to fulfill its duty of accounting and to perform the other duties the statutes of Louisiana impose?

(2) Did the Louisiana Supreme Court correctly apply the Louisiana state law and the general doctrine which forbids parties from assuming inconsistent positions in judicial proceedings?

(3) Is the whole administration of an estate a single proceeding in Louisiana, in which an executor who has undertaken it within the jurisdiction shall be subject to the order of the probate court in the matter until the administration is closed by distribution, and in which the executor who has undertaken it shall be required to account for and distribute all that it receives, by the order of that probate court?

STATEMENT OF THE CASE

After the death of Dr. E. W. K. Andrau in 1951, the Bank qualified as executor in this proceeding in Cause No. 3972 Probate, in the Eighteenth Judicial District Court of Pointe Coupee Parish, Louisiana. * (D.1) **

1. Bank Made Oath It Was And Would Be Present In Louisiana

Upon the oath of its counsel (D. 5), the Bank petitioned the Louisiana District Court to appoint the Bank, an out

* Referred to herein as "Louisiana District Court"

** Respondents use the same record designation as those set out on page 2 of the Petition.

of state bank, as executor in Louisiana, assuring the Court, under oath:

> "That The Second National Bank of Houston*, through its Vice President and Trust Officer, has been present in the State of Louisiana, and will be present therein through its said officer, for the purpose of discharging its duties as Louisiana Executor of said decedent". (D. 4)

In reliance upon the Bank's sworn statement that it had been and would be in Louisiana to discharge its duties as Louisiana executor of the Succession of E. W. K. Andrau, through its designated officer, judgment was entered by the Louisiana District Court on July 10, 1952, that the Bank "is hereby recognized and appointed as Louisiana Executor of the Estate of E. W. K. Andrau * * *" (D. 26).

The Vice President and Trust Officer whom the Bank had designated as its agent and representative in Louisiana, *took oath in Louisiana*** on June 25, 1952, that the Bank "and he, in his aforesaid capacity" would well and truly *perform all of the duties incumbent* upon the Bank *as Louisiana Executor* of the Estate of E. W. K. Andrau." (D. 28).

2. Bank Invoked Jurisdiction Of Louisiana District Court In This Proceeding

As will appear from the list below, the Bank acting upon its own volition, appeared in the Eighteenth Judicial District Court for Pointe Coupee Parish in Louisiana and filed *verified* petitions in which it designated itself as "Louisiana Executor of the Succession of E. W. K. Andrau", Cause No. 3972, on ten occasions from June 10, 1952, to May 5,

* On January 19, 1956, the name of The Second National Bank of Houston was changed to Bank of the Southwest National Association, Houston.

** Emphasis added by us unless otherwise noted.

1966. All are listed below. As is shown in the following listing, on a score of other dates, the Bank acting through its counsel, caused inventories, orders, judgments and rules to be entered or to be issued in this proceeding, and in practically every such instance the Bank is referred to as Louisiana Executor of the Succession.

July 10, 1952 was the date the first *verified* petition was filed by the Bank (D. 1, 5).

On October 3, 1952, the Bank filed Petition for Inventory, (D. 31) *verified* by its counsel (D. 32).

On December 1, 1952, inventories were filed (D. 567).

On December 18, 1958, inventories were filed (D. 571).

Inventories were filed on December 16, 1952, (D. 579).

On February 27, 1953, the Court entered an order for private sale (D. 41).

On June 7, 1953, the Bank acting through George M. Irving, petitioned the Louisiana District Court in a *verified* petition to authorize the Bank as Executor to sell interests in oil, gas and mineral leases located in Louisiana (D. 60).

On March 2, 1953, an inventory was filed (consisting of some 111 pages) of the property in Pointe Coupee Parish, Louisiana, (D. 581 through D. 692) *.

* A cursory look at the properties described in this, and the other three inventories, shows the vast oil and gas properties situated in Louisiana over which the Bank is exercising control as Louisiana Executor. As the record in this case shows, the Bank has never made an accounting for the Louisiana property it holds by order of the Louisiana District Court; the Bank has never been discharged as Louisiana executor; the Bank is *at this time* acting as Louisiana executor, and *at this time* the Bank is still in possession of all of the properties described in the various inventories listed here, except some very minor properties that were sold by the Bank upon its petitions to the Louisiana District Court.

On June 3, 1953, the Bank filed a petition (D. 693).

On August 4, 1953, the Court entered an order (D. 705).

On August 19, 1953, on Motion of Counsel for the Bank, the Louisiana District Court entered an order (D. 708).

On January 5, 1954, the Bank filed a petition to execute instruments, (D. 92). This was *verified* by George M. Irving as "Vice President and Trust Officer of The Second National Bank of Houston, Testamentary Executor of the Estate of E. W. K. Andrau" on December 28, 1953, (D. 96).

On January 6, 1954, counsel for the Bank appeared (D. 159).

On seven occasions, October 1, 1952, December 18, 1952, March 2, 1953, November 28, 1952, June 24, 1952, December 16, 1952, March 25, 1954, (D. 710 through D. 716) Louisiana attorneys as counsel for the Bank wrote letters to the Clerk of the Louisiana District Court enclosing petitions, orders, inventories, and the oath of the Executor, in Cause No. 3972, Succession of E. W. K. Andrau.

On July 30, 1954, the Louisiana District Court entered an order. (D. 163).

On August 2, 1954, George M. Irving, *verified* a Petition. (D. 167).

On August 27, 1954, the Louisiana District Court entered an order granting the relief the Bank sought, (D. 180).

On November 5, 1954, the Louisiana District Court recognized the Bank as "Testamentary Executor of the Succes-

sion of E. W. K. Andrau" and entered an order granting the relief the Bank sought, (D. 182).

On November 5, 1954, a Louisiana attorney, as counsel for the Bank "Executor of the Succession of E. W. K. Andrau" appeared in the Louisiana District Court, (D. 184).

On June 25, 1955, a Louisiana attorney, as counsel for the Bank as Executor, *verified* and filed a petition representing to the Louisiana District Court that the gross value of the property owned by "the decedent *within the State of Louisiana* is the sum of Seven Hundred Sixty-Two Thousand Three Hundred Twenty-four and 32/100 Dollars ($762,324.32)"*, (D. 187). The Bank prayed for a rule there as the respondents seek a rule here. *The Bank thus invoked the jurisdiction of the Louisiana District Court and acknowledged that Court's general jurisdiction to issue rules where Bank was mover.* Here the Bank seeks to evade that jurisdiction when the respondents are movers.

On June 24, 1955, the Louisiana District Court *ordered that a rule issue,* as prayed by the Bank, (D. 193).

On July 8, 1955, the Louisiana District Court ordered that the rule to be issued (upon the Bank's petition, as Executor) be made absolute, (D. 195).

On November 5, 1955, the bank filed a petition, *verified* by its counsel, (D. 199).

On November 5, 1955, the Louisiana District Court ordered that a rule issue, (D. 200).

* This further demonstrates the extensive nature of the Louisiana properties which the Bank is still holding *at this time,* and for which the Bank has never made an accounting to the Court that appointed it as Louisiana executor. By its declinatory exception the Bank seeks to avoid making such an accounting forever.

On August 5, 1955, the Louisiana District Court ordered the rule made absolute (D. 201).

On August 15, 1956, George M. Irving, as Vice President and General Trust Officer, *verified* the Bank's Petition, (D. 212), filed in the Louisiana District Court which states "That your petitioner has been duly appointed, recognized and qualified as the Louisiana Executor of the Estate of E. W. K. Andrau", (D. 206), wherein petitioner prays, (D. 212), "that judgment be rendered herein authorizing and empowering it to execute, *in its capacity as Louisiana Executor*" etc., (D. 206, 212).

On August 21, 1956, the Louisiana District Court entered its Order (D. 214).

On August 21, 1956, Joseph P. Jewell, Clerk of the Louisiana District Court, filed in the Succession of E. W. K. Andrau, Docket No. 3972, notice of application referring to the Bank as "Louisiana Executor of the above estate", (D. 215).

On September 14, 1956, the Louisiana District Court entered judgment, recognizing the Bank "in its capacity as Louisiana Executor of the Estate of E. W. K. Andrau", (D. 230).

On October 15, 1956, George M. Irving, as the "Vice President and General Trust Officer of Bank of the Southwest National Association, Executor of the Succession of E. W. K. Andrau" signed and *verified* a petition, (D. 237), filed by the *Bank in proceeding No. 3972* "appearing and acting herein in its capacity as the duly appointed and qualified Louisiana Executor of the Succession of E. W. K. Andrau", (D. 234).

On December 11, 1956, the Louisiana District Court entered its order, (D. 245).

On December 11, 1956, J. Thos. Jewell, as counsel for the Bank "Louisiana Executor of the Succession of E. W. K. Andrau", questioned J. P. Jewell, Clerk of the Louisiana District Court. (D. 247).

On December 11, 1956, the Louisiana District Court entered judgment, recognizing the Bank "in its capacity as Louisiana Executor of the Estate of E. W. K. Andrau" authorizing ratification of a sale, (D. 250).

On March 12, 1965, the Bank as "Testamentary Executor of this Succession" in this Louisiana District Court filed an unverified petition. (D. 256).

On May 5, 1966, the Bank filed its Petition as "Testamentary Executor of this succession", praying that "in its capacity as Executor of the Succession of E. W. K. Andrau" that it be authorized to execute the proposed ratification agreement, in which the Bank states:

> "A question has arisen concerning the legal authority of Petitioner to act for this succession, without Court approval, in signing the above mentioned Sublease Agreement and Extension Agreement; and Petitioner, in its capacity as executor of this succession, wishes to eliminate any such question by executing a ratification instrument, properly approved and authorized by this Court, on the form attached to this petition as Exhibit 'C'." (D. 261)

In the above quoted petition the Bank recognizes and acknowledges its accountability to the Louisiana District Court, *and reaffirms the jurisdiction of that court on May 5, 1966.* (D. 260)

By appearing directly or indirectly *in Cause No. 3972*, the Succession of E. W. K. Andrau in the 18th Judicial District

Court, on the many dates listed above, the Bank repeatedly and consistently represented to the Court that it was present in Louisiana, was acting as Louisiana executor of the Estate of E. W. K. Andrau, and would discharge all its duties as such executor under the laws of Louisiana, and by its actions, represented to the Louisiana District Court that it had waived any exemption it might have under 12 USC Sec. 94 to question the right of the Louisiana District Court in these proceedings to require the Bank to fulfill its duties under the laws of Louisiana as Louisiana executor. The Bank by the statements under oath of its counsel and of its officer that it "will be present [in Louisiana] *through its said officer* for the purpose of discharging its duties as Louisiana Executor" on July 10, 1952, designated said officer as its agent for service in Louisiana. (D. 1, 5).

3. Order Of Louisiana District Court Which Bank Seeks To Escape By Plea To Jurisdiction, Is An Order By A Court To An Executor Who Is An Officer Of That Court

The petitioner speaks of the present controversy as though it were a separate action, brought by the respondents, as plaintiffs, against the Bank, as defendant. That is not the situation here. While the respondents are movers, the motion (S. 14) prays that a rule nisi issue directing the Bank to show cause why it should not fulfill the eleven enumerated duties that an executor is legally obligated under the laws of Louisiana to perform, (S. 19). While movers will receive some benefits if the Bank as executor is compelled to perform its legal duties, *the Louisiana District Court could have issued this order on its own motion** to require the executor as an officer of the Eighteenth Judicial District

* Former Article 1674, Louisiana Revised Civil Code, and Article 3331 Louisiana Code of Civil Procedure.

Court to file a final account, fulfill other duties of an executor, and show cause why the administration of the Louisiana Succession should not be promptly terminated.

The Bank, by filing its declinatory exception, is contending that the Louisiana District Court has no right to require the Bank as executor appointed by that Court to make an accounting or to perform any other act that the Louisiana District Court can require an executor appointed by it to do. The Bank takes this position despite its having qualified as executor, taken the executor's oath, and invoked the jurisdiction of the court as "Louisiana executor" on many occasions, as set out *supra*.

REASONS WHY THE WRIT SHOULD BE DENIED

1. This Court Does Not Have Jurisdiction

(1) *Waiver, Estoppel And Inconsistent Positions Are* Not *Federal Questions*

The only questions the Louisiana Supreme Court could logically have based its judgment upon are: the waiver by the Bank of its exemption under 12 USC Section 94, the Bank's being estopped to deny such waiver, the application of Louisiana laws in determining the jurisdiction of Louisiana courts, and the Bank's attempting to take inconsistent positions in the same proceedings. *All of these are nonfederal questions.* This court has consistently refused to take jurisdiction to consider such nonfederal questions. In *Leonard v. Vicksburg*, (1905) 198 U.S. 416, cited *supra*, this Court held:

> "'A person may, by his acts or omission to act, waive a right which he might otherwise have under the Constitution of the United States as well as under a statute, and the question whether he has or has not lost such right by his failure to act or by his action is not a Federal one.'

> "In the present case, the supreme court of Louisiana applied the doctrine which forbids parties from assuming inconsistent positions in judicial proceedings."

Leonard is adequate precedent to answer all the questions here adversely to the Bank's petition, and to warrant the denial of the petition for certiorari.

In *Eustis v. Bolles*, (1893) 150 U.S. 361, this Court held that it must appear affirmatively that the decision of the federal question was necessary to the determination of the cause.

In *Gillis v. Stinchfield*, (1895) 159 U.S. 658, 660, *estoppel* was held to be *nonfederal* grounds.

There are many other decisions by this Court which follow the same principles enunciated in *Leonard*, *Eustis*, and *Gillis*. No decisions by this Court have been found which appear to hold contrary views to those expressed in these three cases.

It is the law of Louisiana that parties cannot make an assertion in court for their own benefit, and then be heard to say that their assertion was false. The Louisiana Court of Appeal so decided in *Abbot v. Wilbur**, (1870) 22 La. App. 368. Such decision is a nonfederal ground. This Court has held that *estoppel* arising because of the contradictory statements made by one of the defendants at a different time and place involves no Federal question. *Beals v. Cone*, (1903) 118 U.S. 184.

(2) *Petitioner Has Failed To Meet Its Burden*

The burden is upon the Bank as petitioner to show affirmatively that this Court has jurisdiction. The Bank has not

* *Abbot* was quoted and approved as "directly in point" by this Court in *Davis v. Wakelee*, (1894) 156 U.S. 680. Quotations from both decisions will be found, *infra*.

made such a showing. This Court held in *Gorman v. Washington University* (1941) 316 U.S. 98, 101:

> "Upon application to this Court for review of the judgment of a state court it is the petitioner's burden to show affirmatively that we have jurisdiction."

The Bank cannot affirmatively show the Louisiana Supreme Court's judgment was upon federal grounds since it is obvious that the Louisiana Supreme Court must have rested its judgment upon nonfederal grounds. While the Louisiana Supreme Court wrote no opinion, the questions before it were the nonfederal questions as to waiver, estoppel, Louisiana state law, and the Bank's attempt to take inconsistent positions. There was no dispute between the Bank and the respondents as to the existence of 12 USC Section 94, nor as to the petitioner being a national bank. The law seems well settled that a bank can waive its immunity under 12 USC Section 94. The Bank here so recognizes that waiver is possible on page 7 of its Petition. The case which the Bank relies upon most, *Mercantile National Bank v. Langdeau*, (1963) 371 U.S. 555, also recognizes the fact that a bank may waive its immunity under 12 USC Section 94, by citing as "notable" the decision in *First National Bank of Charlotte*, (1889) 132 U.S. 141, (quoted, *infra.*)

The Bank has not met its burden *to show affirmatively that a federal question was present and its decision was necessary to the determination of the cause. Supreme Court Rule 23 1. (f); Johnson v. Risk* (1890) 137 U.S. 300; *Waters Pierce Oil Co. v. State of Texas* (1908) 212 U.S. 86; *Williams v. Oliver* (1851) 53 U.S. 111.

In *Bachtel v. Wilson*, (1906) 204 U.S. 36, no opinion was filed by the state Supreme Court, and this Court, with reference to the judgment, held at page 40:

> "The supreme court of a state is the ultimate tribunal to determine the meaning of its local statutes."

Mr. Justice Black, speaking for this Court, held in *Kersh Lake Drainage District of Jefferson v. Johnson* (1940) 309 U.S. 485, that a *determination by the states highest court is binding upon this court* as to the jurisdiction of the state Chancery Court under the State law.

This Court, in *Bilby v. Stewart*, (1918) 246 U.S. 255, after finding that a federal question *did* exist, held:

> "since the supreme court rested its judgment upon a non-Federal ground adequate to support it, the existence of a Federal question is of no significance."

This Court held in *Buck v. People of the State of California*, (1952) 343 U.S. 99, 103:

> "[I]f it does not appear upon which of two grounds the judgment was based and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction." (Citing numerous cases)

Mr. Justice Brennan held, in *Henry v. State of Mississippi*, (1965) 379 U.S. 443, 446:

> "It is, of course, a familiar principle that this Court will decline to review state court judgments which rest on independent and adequate state grounds, even where those judgments also decide federal questions."

Mr. Justice White held, in *Jankovich v. Indiana Toll Road Commission*, (1965) 379 U.S. 487, 482:

> "Under our settled decisions the state ground in this case must be regarded as an independent and adequate ground of decision, and we so hold."

To the same effect are: *Consolidated Turnpike Company v. Norfolk*, (1913) 228 U.S. 596; *McGoldrick v. Gulf Oil*, (1939) 309 U.S. 2-3; *Lynch v. People of the State of New York*, (1934) 293 U.S. 52.

Here the Bank, as petitioner, has wholly failed to meet its burden. The Bank appears to have assumed that this Court will take jurisdiction, despite the obvious fact that the judgment of the Louisiana Supreme Court must have rested upon nonfederal grounds.

(3) *Where Judgment* Might *Have Rested On Nonfederal Grounds This Court Will Not Take Jurisdiction*

This Court went further in *Stembridge v. State of Georgia*, (1952), 343 U.S. 541, and held:

> "Where the highest court of the state delivers no opinion and it appears that the judgment *might* have rested upon a nonfederal ground, this Court will not take jurisdiction to review the judgment." (citing many cases) (emphasis by the Court)

(4) *The Logical Basis For Louisiana Supreme Court's Judgment Rests Upon Nonfederal Grounds*

The Louisiana Supreme Court did not write an opinion. It held that "the Judgment of the trial court is correct" (A). The Louisiana Supreme Court had before it the Briefs filed by respondents (S. 37, 66) wherein the nonfederal questions of waiver, estoppel, state law, and the prohibition against a party taking inconsistent positions are discussed. (S. 37, 66). These were questions before that Court.

The respondents relied (S. 66) upon the Louisiana Court of Appeal's holding in *Gravet v. Gonsoulin*, (1929) 120 So. 643. That decision pronounced the state law of Louisiana to be:

> "It seems to us that it would be unconscionable to permit plaintiff who filed the present suit in 1928, after such a long period of inaction, to attack as null and void the acts performed by her agent in her behalf and

> for her benefit. It makes no difference whether Adrien Gonsoulin's authority was vested in him by law or by the consent of the plaintiff. She is equally bound in either event, and is now estopped from questioning that authority. * * *

Respondents called the Louisiana Supreme Court's attention to the holding *In re Estate of Schutte*, (1965) 134 N.W. 2d 600, where the Nebraska Supreme Court held, at page 605, 606:

> "Such jurisdiction and authority of the county court continue until the executor or administrator has fully complied with all its judgments, orders, and decrees and the estate has been placed in the possession of those to whom it devolves. * * *
>
> Also, it has been held: 'A litigant who has invoked the jurisdiction of the court upon a matter of which it has power to take cognizance cannot thereafter object thereto'. In re Estate of Nilson, 126 Neb. 541, 253 N.W. 675."

Respondents cited and quoted (S. 72) to the Louisiana Supreme Court the decision of *Kirby v. Kirby*, (1936) 55 P. 2d 356, where the supreme court of Kansas held *that courts will not tolerate the attempt of persons to invoke the jurisdiction of a court then seek to repudiate the action of the court upon the ground that the court is without jurisdiction.*

Respondents also cited and quoted to the Louisiana Supreme Court other decisions which forbid the taking of an inconsistent position in judicial proceedings. There are:

> *In re Cartmell's Estate*, (1958) 138 A 2d 592; *Lord v. Hubert*, (1957) 145 N.E. 2d 77; *Delco Ice Mfg. Co. v. Frick Co., Inc.* (1935), 178 A. 135; and *In re Barnes Estate*, (1931) 235 N.W. 701. (S. 71-73)

It is logical to assume that the Louisiana Supreme Court based its judgment upon nonfederal grounds. If that is not conceded, then it seems inescapable that the judgment *might** have been upon nonfederal grounds. *Stembridge v. State of Georgia,* (1952) 343 U.S. 541.

If this Court finds that it does not have jurisdiction, of course there is no need to consider the following portion of this brief, which concerns the jurisdiction of the Louisiana District Court.

2. The Louisiana District Court Has Jurisdiction

(1) *Having Voluntarily Invoked The Probate Court's Jurisdiction, An Executor Cannot Repudiate That Jurisdiction*

In an early case, this Court considered the effect of one voluntarily making himself party to proceedings *in Louisiana,* in *Clay v. Smith,* (1830) 28 U.S. 3, Pet. 411 [7:723], and held that immunity could be, and was, abandoned.

Applying the doctrine to a national bank that sought to change its position after having submitted to the jurisdiction, this Court held in *First National Bank of Charlotte v. Morgan* (1889) 132 U.S. 141, 145:

> " * * * Considering the object as well as the words of the statute authorizing suit against a national banking association to be brought in the proper state court of the county where it is located, we are of the opinion that its exemption from suits in other courts of the same State was a personal privilege that it could waive, and which, in this case, the defendant did waive * * * And this consideration supports the view that the exemption of a national bank from suit in any state court except one of the county or city in which it is

* Emphasis that of the Court.

> located is a personal privilege, which it could claim or not, as it deemed necessary."

This Court held in *Ex Parte Schollenberger*, (1877) 96 U.S. 369, 378:

> "* * * If the citizenship of the parties is sufficient, a defendant may consent to be sued anywhere he pleases * * *"

The opinion in *Central Trust Co. v. McGeorge*, (1893) 151 U.S. 129 cites, quotes from, and follows *First National v. Morgan, and Schollenberger.*

The Fifth Circuit arrived at the same conclusion in *Hoxsey v. Hoffpauir*, (1950) (certiorari denied 70 S. Ct. 841) 180 F. 2d 84.

The Eighth Circuit took cognizance that *no federal question is presented* in a determination of the jurisdiction of a probate court, in *Redditt v. Hale*, (1950) 184 F. 2d 443, and (1952) 199 F. 2d 386.

In a number of cases courts have held that executors, administrators, or corporations could not voluntarily invoke a court's jurisdiction and subsequently escape that jurisdiction. *Friele v. Schaffer*, (1959) 177 F. Supp. 654; In re *Cartmell's Estate*, (1958) 138 A. 2d 592; *Bryan v. Miller*, 16 N.W. 2d 275; *Delco v. Frick*, (1935) 178 A. 135; *Ellis v. Starr*, 49 S.W. 2d 1078; In re *Barnes Estate*, 235 N.W. 701, 135 A. 219; *Martel v. Block*, (La. Supreme Court 1923) 98 So. 400.

(2) *Bank Has Waived Its Exemption Under 12 USC Section 94 And Is Estopped To Deny The Jurisdiction Of The Louisiana District Court*

In *Ohio and Mississippi Ry. Co. v. McCarthy*, (1887) 96 U.S. 258, this Court stated that a party can not "mend his

hold", that "He is estopped from doing it by a settled principle of law."

The Louisiana Court of Appeal, in *Abbot v. Wilbur*, (1870) 22 La. App. 368, 371, stated the law of Louisiana as to estoppel to be:

> "* * * A party who has acquiesced in a judgment, can not sue to annul it, no matter how radical its defects, or absolute its nullity * * *.
>
> "* * * they can not be heard now to say that their assertion was false."

This Court cites *Abbot v. Wilbur, supra*, saying it is "directly in point", quotes the same sentence we have quoted above from *Ohio and Mississippi Ry. Co.*, and holds, in *Davis v. Wakelee*, (1894) 156 U.S. 680, 689, 690:

> "It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be the prejudice of the party who has acquiesced in the position formerly taken by him.

In one such case, striking down an "about face", the Arizona Supreme Court held in *Martin v. Wood*, (1951) 229 P. 2d 710, 712:

> "* * * in the lower court, in the instant case appellant proceeded to do an 'about face' * * * Appellant will not be allowed to take such a contrary position to the prejudice of appellee."

Other judicial holdings that agree with the opinions cited under this subhead of this brief are: *Leonard v. Wharton*, (1967) 268 F. Supp. 715, *Mahlum v. Carlson*, (Ninth Circuit 1962) 304 F. 2d 285, *Admiral Theatre Corp. v. Paramount*,

(1955) 140 F. Supp. 686, *Lord v. Hubert*, (1957) 12 Ill. 2d 83, 145 N.E. 2d 77, *Harlan v. Harlan*, 161 P. 2d 490, *Hargrave v. Turner*, (1940) 193 So. 648.

The South Dakota Supreme Court "condemned" the "anomalous situation" of an executor who made a representation to a probate court, and in a subsequent suit, contended to the contrary, as being conduct "playing fast and loose with the court", in *Behrens v. Baldenecker*, (1956) 77 N.W. 2d 917, 919.

Here, the same "anomalous situation" is found which *Behrens* "condemns". The Bank here is taking diametrically opposed positions *in the same proceedings.*

3. Reply To The Bank's Contentions

(1) *Bank Assumed Duties Under Louisiana Statutes Which It Is Legally Bound To Fulfill*

In their "Pre-Trial Memorandum in Opposition to the Declinatory Exception" (S. 37), respondents cited twenty-one Louisiana statutes which govern the rights, privileges, duties and responsibilities of the Bank as Executor.

In the interest of brevity, the statutes granting *rights and privileges* to the Bank (S. 40) will only be cited here. They are Louisiana Code of Civil Procedure Articles 3191, 3196, 3198, 3211, 3223, 3224, 3226, 3228, 3229, 3351 and 3261. All are briefly described in the Memorandum (S. 40).

By voluntarily appearing and qualifying and continuing to act as Louisiana Executor, the Bank assumed at least the following *obligations and responsibilities*:

1. It assumed the duty of collecting, preserving and managing the property of the succession in accordance with law. It had the further obligation to act at all

times as a prudent administrator subject to personal responsibility for all damages resulting from failure to so act. *Article 3191, Louisiana Code of Civil Procedure.*

2. It assumed the duty of closing the succession as soon as advisable. *Article 3197, Louisiana Code of Civil Procedure.*

3. It assumed the duty of enforcing all obligations in favor of the succession. *Article 3211, Louisiana Code of Civil Procedure.*

4. It assumed the duty of preserving, repairing, maintaining and protecting the property of the succession. *Article 3221, Louisiana Code of Civil Procedure.*

5. It assumed the duty of depositing all monies collected by it as soon as received, in a bank account in its official capacity, in a State or National Bank in Louisiana with the further obligation not to withdraw the deposits, or any part thereof, except in accordance with law. Former *Article 1150, Revised Civil Code* and *Article 3222, Louisiana Code of Civil Procedure.*

6. It assumed the obligation, if it was to the best interest of the succession, and subject to the primary duty to preserve the estate for prompt distribution, of investing the succession funds and making them productive. *Article 3223, Louisiana Code of Civil Procedure.*

7. It assumed the obligation of paying the debts and charges of the succession but only with authorization of the Court. *Article 3301, Louisiana Code of Civil Procedure,* and *Articles 1180, 1181* and *1184 of the Revised Civil Code.*

8. It assumed the obligation of filing a tableau of distribution in accordance with law. *Article 3303, Louisiana Code of Civil Procedure.*

9. It assumed the obligation of filing an account annually and at any other time *when ordered by the*

Court on its own Motion or on the application of any interested person. Former *Article* 1674, *Revised Civil Code and Article 3331, Louisiana Code of Civil Procedure.*

10. It assumed the obligation, at the appropriate time, of filing a final account in accordance with *Article 3332 of the Louisiana Code of Civil Procedure.*

The Louisiana District Court issued its rule nisi, as sought by the movers (S. 19), ordering the Bank to fulfill its duties under Louisiana Code of Civil Procedure Articles 3222, 3223, 3301, 3303, 3331, 3332; under Louisiana Revised Civil Code Articles 1180, 1181, 1184, and other statutes. This is an order by a Louisiana probate court to an executor, as an officer of that court, to obey those laws of Louisiana which require an executor to file a current account, file a Tableau of Distribution, file a final account, terminate the Louisiana Succession, make payments, and perform other acts required by the laws of Louisiana. The Bank's response is a plea to the jurisdiction, wherein the Bank is asserting that, despite the many voluntary appearances it has made in this Probate Cause No. 3972 in the Louisiana District Court (as listed *supra* under "Statement of the Case"), that it can deprive this Louisiana District Court of jurisdiction.

It is the law of Louisiana that it would be unconscionable to permit one to take a position such as the Bank is taking here, and that one who attempts to do so is estopped. *Gravet v. Gonsoulin,* (1929) 120 So. 643, cited *Supra.*

(2) *In Louisiana An Administration Of An Estate Is A Single Proceeding Until Completed*

That the present Order is a part of the same "proceeding" as that voluntarily instituted by the Bank seems to be settled by the provisions of the Louisiana Revised Civil

Code, cited *supra*, and by the decisions of the Louisiana courts and the decisions of this Court, cited *infra*.

In an early decision the Louisiana Court held "no doubt was entertained as to the jurisdiction of the probate court" to carry into effect its own orders as to parties who had invoked the jurisdiction of the probate court. *Narcisse Landry v. Connely*, (1843) 4 Robinson's Reports 127. Later, (1929), in *Gravet v. Gonsoulin*, 120 So. 643, the Louisiana Court of Appeal held; 645:

> "It is also true that Adrien Gonsoulin administered said property * * * he was compelled to open the succession; that he first opened it in 1906, filed additional *proceedings* in 1917, and finally terminated his administration in 1922 or 1923. During all of these years plaintiff resided within the parish of Iberia. The *proceedings* commenced by her agent, Adrien Gonsoulin, were conducted openly, necessary legal notices appeared in the official paper of the parish of Iberia * * *"

The Court then went on to hold in the *Gravet* decision that it would be unconscionable to permit the plaintiff to attack the acts of her agent; that the want of jurisdiction may be waived; that the plaintiff had waived the jurisdiction. This portion of the opinion is quoted, *supra*. The Court in *Gravet* holds that in a probate "proceeding" in Louisiana when one has submitted to the jurisdiction of a probate court in Louisiana, he has *waived his rights to question that jurisdiction* in the future, and is *estopped from questioning that jurisdiction*.

This Court held, in *Vaughan v. Northup*, (1841) 40 U.S. 1, 5:

> "On the other hand, the administrator is exclusively bound to account for all the assets which he receives

> under and in virtue of his administration to the proper tribunals of the government from which he derives his authority; and the tribunals of *other States have no right to interfere* with or to control the application of those assets, according to the lex loci."

This Court held, in *Reynolds v. Stockton* (1890) 140 U.S. 254, 272:

> "Where a receiver or administrator or other custodian of an estate is appointed by the courts of one State, *the courts of that State reserve to themselves full and exclusive jurisdiction* over the assets of the estate within the limits of the State."

In an opinion by Mr. Justice Holmes, this Court held, in *Michigan Trust Co. v. Ferry,* (1912) 228 U.S. 346, 353:

> "* * * if a judicial *proceeding* is begun with jurisdiction over the person of the party concerned, *it is within the power of a state to bind him by every subsequent order in the cause* * * * This is true not only of ordinary actions, but of *proceedings* like the present. *It is within the power of a state to make the whole administration of the estate a single proceeding,* to provide that one who has undertaken it within the jurisdiction shall be subject to the order of the court in the matter until the administration is closed by distribution, and, on the same principle, that *he shall be required to account for and distribute* all that he receives, *by the order of the probate court.*"

The Bank does not cite *Vaughan, Reynolds,* nor *Michigan Trust Co.,* in the Bank's petition, yet it would appear that these three opinions cover all the points at issue as to the Louisiana District Court's jurisdiction over the Bank.

The opinion of Mr. Justice Holmes in *Michigan Trust Company* is a complete answer to all the Bank's contentions as to the February 28, 1968 Order (D. 726) not

having issued in the same proceeding. In the light of the Louisiana cases respondents have cited, and this Court's holdings in *Vaughan*, *Reynolds* and *Michigan Trust Co.*, it is submitted that the Bank's position is not in accord with these decisions.

(3) *"No Man Can Take Advantage Of His Own Wrong"**

The Bank admits, on page 7 of its petition, that *Lichtenfels v. North Carolina National Bank* (North Carolina Supreme Court 1963) 132 S.E. 2d 360, holds that "a national bank's pre-suit conduct may constitute a waiver". The Bank places reliance upon *Mercantile National Bank v. Langdeau*, (1963) 371 U.S. 555, but *the questions of waiver, estoppel, state law or inconsistent positions* were not raised in that case. Even though the waiver question had no part in the controversy there being adjudicated, this Court carefully noted in *Mercantile National Bank v. Langdeau* that a bank *could waive its immunity*, by citing as "notable" the decision of *First National Bank of Charlotte v. Morgan*, (1889) 132 U.S. 141, which holds, as quoted *supra*, that the exemption of a national bank is a personal privilege which can be waived.

The Bank relies upon *Buffum v. Chase National Bank* (1951) 192 F. 2d 58, but that decision *also holds*, with reference to 12 USC Section 94, that (p. 60):

> "It is a personal right and, obviously, may be waived by the conduct of the one to whom it belongs."

The Bank cites numerous cases where 12 USC Section 94 is *not* involved. All of the cases the Bank cites, and the respondents have found, which consider 12 USC Sec. 94, seem in agreement that: *a bank can waive its* exemption

* Daniels v. Tearney, (1880) 102 U.S. 415, 422.

under 12 USC Section 94. Since the facts are distinguishable in the cases cited by the Bank from the facts here, the question presented here, *if* this Court has jurisdiction, is: upon the facts in *this* case, did *this* Bank waive its exemption under 12 USC Section 94?

The *Lichtenfels* opinion is the *only authority* which the petitioner cites, or the respondents have found, *where the facts are almost identical with those in this controversy.*

In *Lichtenfels*, the court had this Court's decision in *Mercantile National Bank v. Langdeau* before it, and cites that opinion, along with *Michigan National Bank v. Robertson*, 372 U.S. 591 and *First National Bank of Charlotte v. Morgan*, as holding that congress has merely accorded national banks a privilege, which "may be waived by conduct prior to the institution of the action."

In *Lichtenfels*, the court cites, quotes, and relies upon the statement by Mr. Justice Holmes in *Michigan Trust Co. v. Ferry*, 228 U.S. 346, as to *the administration of an estate being a single proceeding.* The holding in *Lichtenfels* is so *perfectly in point* that the entire opinion could be quoted here, but only these excerpts are reproduced here:

> *"The proper venue for actions against executors and administrators is the county in which they qualify.*
>
> * * * * *
>
> "Defendant relies on sec 94, Title 12 (Banks and Banking), of the United States Code. * * * The statute does not limit the jurisdiction of state courts. Congress has merely accorded national banks the privilege of having controversies to which they are parties determined in the county of their residence. Mercantile National Bank v. Langdeau, 371 U.S. 555, 83 S. Ct. 520, L. ed. 2d 523. This privilege, granted for the

convenience of national banks can be waived. Michigan Nat. Bank v. Robertson, 372 U.S. 591, 83 S. Ct. 914, 9 L. ed. 2d 961; Mercantile National Bank v. Langdreau, supra; First National Bank of Charlotte, North Carolina v. Morgan, 132 U.S. 141, 10 S. Ct. 37, 39, 33 L. ed. 282.

"The right of a defendant to challenge the venue selected by plaintiff *may be waived by conduct prior to the institution of the action.*

* * * * *

"Neither defendant nor Security National were under compulsion to handle the trust estate created by Mrs. Long's will. Undoubtedly they sought and accepted the grant of authority conferred on them by the Superior Court of Buncombe County for pecuniary reasons.

"Defendant's asserted right to remove requires an answer to this question: Can defendant deprive the Superior Court of Buncombe County of its right and nullify its duty to inquire into the accuracy of defendant's final account merely because it best suits defendant's convenience for the inquiry to be made in Mecklenburg, where it has its principal office, rather than in Buncombe, where it qualified and the law requires it to account? Manifestly the answer must be and is no."

The Bank makes only casual reference to its "pre-suit conduct" in the Louisiana District Court, but as is set out in the respondents' *Statement, supra,* on at least eleven occasions between June 10, 1952, and May 5, 1966, the Bank was a petitioner in the Louisiana District Court.

To such extent that the Bank has received executor's fees, this Bank here, as the Security National Bank did in *Lichtenfels,* "undoubtedly sought and accepted the grant of authority conferred upon [it] — for pecuniary reasons".

The property which the Bank holds in the Succession of E. W. K. Andrau in Louisiana is actually the property of the Louisiana District Court, which that court holds for the benefit of the heirs who are the respondents here. The Bank, an officer of that court by appointment, is here refusing to make an accounting of the Louisiana Court's property to the Louisiana Court. The Bank is saying that a court in Houston, Texas, should decide upon the Bank's acts and omissions as an executor of a Louisiana court in possession of Louisiana property; that the Louisiana District Court which appointed the Bank as executor has no power to order its executor to make an accounting as to the extensive Louisiana property which the executor holds.

In *Byers v. McAuley* (1892) 149 U.S. 608, 613, 615, this Court decided:

> "No officer appointed by any court should be placed under the stress which rested upon this administrator and compelled for his own protection to seek orders from two courts in respect to the administration of the same estate. * * *
>
> "An administrator appointed by a state court is an officer of that court; *his possession* of the decedent's property is a possession taken in obedience to the orders of that court; it *is the possession of the court*, and it is a possession which *cannot be disturbed by any others court*. Upon this proposition we have direct decisions of this court. * * *
>
> "There is nothing in any decision of this court, controverting the proposition thus stated, that the administrator is the officer of the state court appointing him, and that property placed in his possession by order of that court *is in the custody of the court*."

Upon the doctrine in *Byers*, the Bank's petition should be denied.

It was stated in *Daniels v. Tearney*, (1880) 102 U.S. 415, at page 421, 422:

> "* * * for the general rule is, that no man can take advantage of his own wrong.
>
> * * * * *
>
> "The parties are estopped from availing themselves of such a defense."
>
> "Not to apply the principle of estoppel to the bond in this case would, it seems to us, involve a mockery in judicial administration and a violation of the plainest principles of reason and justice."

This Court has held in *The Philadelphia, W. & B. Railroad Co. v. Howard*, (1851) 54 U.S. 305, at page 336, 337:

> "This brings the defendant within the principle of the common law, that when a party asserts what he knows is false, or does not know to be true, to another's loss, and his own gain, he is guilty of a fraud; a fraud in fact, if he knows it to be false, fraud in law, if he does not know it to be true.
>
> * * * * *
>
> "We are clearly of opinion, that the defendant cannot be heard to say, that what was asserted on the former trial was false. * * *"

A corporation is estopped to say that it has not done what it should have done, according to this Court's holding in *Old Wayne Mutual Life Association v. McDonough*, (1907) 204 U.S. 8.

If the Bank can sustain the position it has taken in its petition, it will be permitted to take advantage of its own wrong. As this Court said in *Daniels*, quoted above, to permit the Bank to defeat the jurisdiction of the Louisiana District Court would be "a violation of the plainest principles of reason and justice".

CONCLUSION

The respondents respectfully submit that the Bank has failed to meet its burden to affirmatively show that this Court has jurisdiction.

The respondents further respectfully submit, if need be, that the Louisiana District Court does have jurisdiction to issue the order it issued to its executor, since the property held by the executor is the property of the court, and the administration of an estate in Louisiana is a single proceeding. By having made numerous voluntary appearances in the Louisiana District Court, the Bank waived its exemption under 12 USC Section 94, and is now estopped to repudiate the jurisdiction of a court in which, *in this same proceeding*, it made oath that it, as Louisiana executor, would fulfill all its duties.

The Bank's petition for a Writ of Certiorari should be denied, and the respondents so pray.

Respectfully Submitted,

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November 4, 1968

CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing Respondents' Opposition Brief To Petition For A Writ of Certiorari to the Supreme Court of Louisiana were duly served upon L. Keith Simmer, Esq. and James C. Slaughter, Esq., of Fulbright, Crooker, Freeman, Bates & Jaworski, 8th Floor, Bank of the Southwest Building, Houston, Texas 77002; Victor A. Sachse, Esq., 701 Fidelity National Bank Bldg., Baton Rouge, Louisiana 70801; and J. Thomas Jewell, Esq., New Roads, Louisiana, attorneys of record for the exceptor in the proceedings on the motion for rule to show cause filed in the Succession of E. W. K. Andrau, Probate No. 3972, Eighteenth Judicial District Court, Parish of Pointe Coupee, State of Louisiana. This service was by depositing said copies so addressed in the United States Mail, Air Mail, Certified Mail, Return Receipt Requested, with the full postage prepaid on the 2nd day of November, 1968. As Rule 33 provides, all parties required to be served have been served.

Claude R. Miller

Attorney for Respondents